Bank Pembangunan (M) Bhd v SASACOM Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–80 OF 2008-II
YEW JEN KIE J
29 NOVEMBER 2012

Civil Procedure — Intervention — Application for — Made by Controller of Rivers, Sarawak Rivers Board ('intervenor') — Whether intervenor had power to remove vessel from river — Whether vessel came within definition of 'vessel' in s 2 of the Merchant Shipping Ordinance 1960 — Whether applicable section was s 2 of Merchant Shipping Ordinance 1952 — Whether defendant's application frivolous

Civil Procedure — Order — Setting aside — Order of court allowing Controller of Rivers, Sarawak Rivers Board leave to intervene and remove sunken vessel — Whether High Court lacked jurisdiction to make order — Whether order was null and void

The defendant was the owner of the ship or vessel SASACOM I ('the vessel'), which sank in the Sarawak River. The Controller of Rivers, Sarawak Rivers Board ('the intervenor') had applied to the High Court for leave to be allowed to intervene and for certain reliefs relating to the removal of the sunken vessel, which had become a danger to or interference with riverine traffic. In the inter partes hearing of the leave application the defendant had not objected to the intervention by the Intervenor or the removal of the vessel except the costs of removing the same. The High Court allowed the Controller of Rivers, Sarawak Rivers Board ('the intervenor') to intervene in this action and to remove and dispose of the sunken vessel. However, by way of the present application made pursuant to O 42 r 13 and O 92 r 4 of the RHC and s 2 of the Merchant Shipping Ordinance 1960 ('the MSO 1960') the defendant applied to set aside the order of the High Court. The defendant submitted that since the vessel was a stationed floating dock for the repair and docking of vessels, it did not come within the definition of 'vessel' in s 2 of the MSO 1960. As such, the defendant argued that the Intervenor had no jurisdiction to manage or deal with the sunken vessel. It was further submitted that the court order ought to be set aside as null and void because the High Court lacked the jurisdiction to make such an order. The intervenor submitted that by virtue of s 12(1)(b) of the Sarawak Rivers Ordinance 1993, the intervenor had a duty to collect, remove and dispose of any object or wreck in the Sarawak rivers.

Held, dismissing the application with costs of RM5,000:

(1) The High Court judge was right to allow the intervenor to intervene and

to remove the wreck of any object found in the river. As Controller of Rivers the Intervenor has the power to remove any wreck under the SRO 1993. Thus the High Court judge was acting very much within her jurisdiction when she made the order and there was no jurisdictional defect (see paras 13–14).

(2) The definition of 'vessel' in s 2 of the MSO 1960 was wide enough to include a floating dock. As such, the SASACOM I did come within s 2 of the MSO 1960. In any event, the applicable section was s 2 of the Merchant Shipping Ordinance 1960 (MSO 1952), which defines a ship to 'include every description of vessel used in navigation not propelled by oars'. It could not be argued that the floating dock navigates on water within the definition of ship. Further, the fact that the vessel had been registered as a ship under s 12 of the MSO 1952 meant that the court may presume that judicial and official acts had been regularly performed and that the SASACOM 1 was a ship (see paras 15–18).

(3) Having agreed to the intervention by the intervenor and to the removal of the vessel from the river, the defendant has now filed an application some six years later, with no explanation for this delay, to argue that the vessel was not governed by the MSO 1960. The defendant should not be allowed to blow hot and cold at the same time. Further, the defendant's application was frivolous in that the defendant's director made this application at the time when the defendant was insolvent (see paras 20 & 22).

[Bahasa Malaysia summary

Defendan merupakan pemilik kapal SASACOM I ('kapal tersebut'), yang telah tenggelam di Sungai Sarawak. Pengawal Sungai-sungai, Lembaga Sungai Sarawak ('pencelah') telah memohon kepada Mahkamah Tinggi bagi kebenaran untuk mencelah dan bagi relief-relief tertentu berkaitan dengan penyingkiran kapal yang tenggelam itu, yang telah menjadi bahaya kepada atau gangguan kepada lalu lintas sungai. Dalam perbicaraan inter parte bagi permohonan kebenaran, defendan tidak membantah pencelahan oleh pencelah atau penyingkiran kapal kecuali kos-kos penyingkirannya. Mahkamah Tinggi membenarkan Pengawal Sungai-sungai, Lembaga Sungai Sarawak ('pencelah') untuk mencelah dalam tindakan ini dan untuk menyingkirkan dan melupuskan kapal yang tenggelam itu. Walau bagaimanapun, melalui permohonan yang dibuat di bawah A 42 k 13 dan A 92 k 4 KMT dan s 2 Merchant Shipping Ordinance ('MSO 1960'), defendan memohon untuk mengenepikan perintah Mahkamah Tinggi. Defendan menghujahkan bahawa oleh kerana kapal tersebut ditempatkan di dok terapung untuk pembaikan dan dok kapal, ia tidak terjumlah di bawah definisi 'kapal' dalam s 2 MSO 1960. Oleh itu, defendan menghujahkan bahawa pencelah tidak mempunyai bidang kuasa untut menguruskan atau berurusan dengan kapal yang tenggelam itu. Dihujahkan selanjutnya bahawa perintah

A mahkamah tersebut patut diketepikan sebagai batal dan tidak sah kerana Mahkamah Tinggi tidak mempunyai bidang kuasa untuk membuat perintah sedemikian. Pencelah mengemukakan bahawa menurut s 12(1)(b) Sarawak Rivers Ordiance 1993, pencelah mempunyai tanggungjawab untuk mengumpul, mengeluarkan dan melupuskan apa-apa objek atau bangkai kapal
B di sungai-sungai Sarawak.

Diputuskan, menolak permohonan dengan kos RM5,000:

(1) Hakim Mahkamah Tinggi adalah betul dalam membenarkan pencelah
C untuk mencelah dan menyingkirkan bangkai apa-apa objek yang ditemui di sungai. Oleh kerana Pengawal Sungai-sungai, pencelah mempunyai kuasa untuk mengalihkan mana-mana kapal karam di bawah OSS 1993. Oleh itu, hakim Mahkamah Tinggi telah bertindak dalam bidang kuasanya apabila mengeluarkan perintah tersebut dan
D tidak ada kecacatan bidang kuasa (lihat perenggan 13–14).

(2) Takrif 'kapal' dalam s 2 MSO 1960 adalah cukup luas untuk merangkumi dok terapung. Oleh itu, SASACOM I terjumlah di bawah s 2 MSO 1960. Dalam apa jua keadaan, seksyen berkenaan adalah s 2
E Merchant Shipping Ordinace 1952 (MSO 1952), yang mentakrifkan sebuah kapal sebagai 'merangkumi setiap deskripsi kapal yang digunakan dalam pelayaran tidak dikemudikan oleh dayung'. Ia tidak boleh dikatakan bahawa dok terapung yang mengemudi atas air adalah dalam definisi kapal. Selanjutnya, fakta bahawa kapal tersebut telah didaftarkan
F sebagai sebuah kapal di bawah s 12 MSO 1952 bermakna bahawa mahkamah boleh menganggap bahawa tindakan kehakiman dan rasmi telah dilaksanakan mengikut aturan dan bahawa SASACOM I adalah sebuah kapal (lihat perenggan 15–18).

G (3) Setelah bersetuju untuk pencelahan oleh pencelah dan bagi penyingkiran kapal-kapal daripada sungai tersebut, defendan kini telah memfailkan permohonan kira-kira enam tahun kemudian, tanpa penjelasan bagi kelewatan ini, untuk menghujahkan bahawa kapal tersebut tidak dikawalselia oleh MSO 1960. Defendan tidak harus dibenarkan untuk
H berubah atau tidak pasti pada masa yang sama. Tambahan lagi, permohonan defendan adalah remeh kerana pengarah defendan membuat permohonan ini semasa defendan muflis (lihat perenggan 20 & 22).]

I **Notes**

For a case on setting aside, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5754.

For cases on application for, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4345–4351.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Legislation referred to

Companies Act 1965 s 218
Evidence Act 1950 s 114(e)
Merchant Shipping Ordinance 1952 s 2, 12
Merchant Shipping Ordinance 1960 ss 2, 241(2)
Merchant Shipping (Amendment and Extension) Act 1984
Rules of the High Court 1980 O 42 r 13, O 92 r 4
Sarawak Rivers Ordinance 1993 s 12(1)(b), (bb)

Albert Tang (Chew Jugah Wan Ullok & Co) for the plaintiff.
Merlyn Toh (Yi & Co Advocates) for the defendant.
Ivy Suli Untup (Fadzillah with her) (State Attorney General Chambers) for the intervener.

Yew Jen Kie J:

GROUNDS OF RULING (ENCL 7)

[1] Vide summons in chambers dated 19 July 2012 under O 42 r 13 and O 92 r 4 of the Rules of the High Court 1980 and s 2 of the Merchant Shipping Ordinance, the defendant applied for an order to set aside the court order made on 29 August 2006.

[2] 29 August 2006, the High Court had granted a court order which states:

> IT IS ORDERED that
>
> (a) The Controller of Rivers, Sarawak and the Sarawak River Board be granted leave to intervene in this action;
>
> (b) An order that the Controller of Rivers who is also the Deputy Receiver of wreck under section 241(2) of Merchant Shipping Ordinance 1960, shall remove the sunken vessel SASACOMI, and dispose off the same under the relevant laws, and the proceed derived from the disposal thereof, shall be applied towards defraying the costs of the removal and disposal of the vessel, and if such proceeds are inadequate, the balance of these costs may be recovered by the Controller from defendants by civil action; and
>
> (c) The costs incidental to this application shall form part of the costs incurred by the Controller of Rivers.

[3] Section 241(2) of the Merchant Shipping Ordinance 1960 reads:

> The Yang Di Pertua Negeri may appoint any person to be a Deputy Receiver of Wreck for any part of Sarawak, and any such Deputy Receiver of Wreck shall exercise such of the powers as are conferred by this Part on the Receiver of Wreck and may perform such of the duties as are imposed by this Part on the Receiver of Wreck as may be delegated to him by the Receiver of Wreck.

[4] Under the court order, the Controller of rivers, Sarawak Rivers Board was appointed to be the deputy receiver of wreck pursuant to s 241(2) of the Merchant Shipping Ordinance 1960 to remove the sunken vessel SASACOM I and to dispose of the same under the relevant laws in cl (b) of the court order.

[5] Section 2 of the Merchant Shipping Ordinance reads:

> 'Vessel' means anything constructed or used for the carriage on water of persons or property

[6] It is the contention of the defendant that SASACOM I was not a vessel to carry on water of persons or property. It was a stationed floating dock for repair and docking of vessels. It has no engine and could not propel on its own. It, therefore, could not and did not come within the definition of 'vessel' in s 2 of the Merchant Shipping Ordinance. It follows that the intervenor has no authority and/or jurisdiction under the Merchant Shipping Ordinance 1960 to deal and/or to manage the sunken vessel SASACOM I. Hence, the appointment of the intervenor as the deputy receiver of wreck pursuant to s 241(2) of the Merchant Shipping Ordinance 1960 to remove the sunken vessel SASACOM I under cl (b) of the court order is null and void.

[7] It was further submitted that the High Court did not have the jurisdiction to make the court order to grant leave to the intervenor to intervene in this action and, further, give them the authority to deal and/or manage the sunken vessel SASACOM I pursuant to the Merchant Shipping Ordinance 1960. It was submitted that the court order is null and void and ought to be set aside *ex debito justitae* on the ground that it is null and void and that the High Court lacks jurisdiction. Accordingly, this court has the jurisdiction to set aside the court order under its inherent and discretionary jurisdiction, citing *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 where Mohd Azmi FCJ (as he then was) held:

> … It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written

law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[8] In my judgment, the application ought to be to dismissed. My reasons are as follows.

HIGH COURT HAS JURISDICTION

[9] The affidavit in support of Muhamad Yakup bin Kari dated 14 August 2006, filed in support of the intervenor's said application dated 15 August 2006 states, inter alia:

3. In my capacity as Controller of Rivers I have been also appointed as Deputy Receiver of Wreck by the Tuan Yang Terutama Yang di-Pertua Negeri Sarawak pursuant to section 241(2) of Merchant Shipping Ordinance 1960. A copy of the Gazette Notification pertaining to my appointment as Deputy Receiver of Wreck is hereto exhibited and marked 'MY1'.

4. (a) The Sungai Sarawak is a river which is declared by the Sarawak Rivers (Declaration of Rivers) (No. 2) Notification, 1993 (Swk/ L.N. 132/93), is a river in respect of which the provisions of the said Ordinance shall have effect. Therefore, the Sungai Sarawak comes under the jurisdiction of the Board and the Controller of Rivers. A copy of this declaration is hereto exhibited and marked 'MY2'.

(b) By virtue of section 12(1)(b) of the Ordinance the Board has a duty to collect, remove and dispose of any object or wreck in the Sarawak rivers and by virtue of section 5 of the said Ordinance, the functions of the Board include, inter alia, to control and regulate traffic in the Sarawak rivers and to prevent obstruction of any river.

[10] By the definition of 'Wreck' in s 2 of the Merchant Shipping Ordinance, it is not restricted to abandoned or discarded vessel. It includes jetsam and floatsam found in rivers.

[11] Further, pursuant to s 12(1)(b) of the Sarawak Rivers Ordinance 1993, the river board is responsible 'to collect, remove and dispose of or otherwise to deal with any object, wreck, pollutant, tree, timber, log, weed, long grass or any other things or materials in the river'.

[12] Section 12(1)(bb) states the river board's responsibility include:

to take such measures as may be considered necessary or expedient to promote and to ensure safety of riverine traffic.

[13] In the circumstances, as rightly submitted by learned counsel for the plaintiff, the High Court judge was right to allow the intervenor to intervene and to remove the wreck or any object found in the river. It should be noted that the controller of river, who is also the deputy receiver of wreck under s 241(2) of the Merchant Shipping Ordinance 1960, is just an additional position, but as controller, he has the power to remove any wreck under the Sarawak Rivers Ordinance 1993. The reference to the controller of rivers, who is also the deputy receiver of wreck, in the order of 29 August 2006, is only an additional description of his roles.

[14] Based on the reasons aforesaid, the learned High Court judge was acting very much within her jurisdiction to make the order on 29 August 2006. There being no jurisdictional defect, the defendant has no leg to stand with its belated application to set aside the order made on 29 August 2006. If it is not happy with the order, it should appeal against the order and of course, the time frame to appeal is well over.

SASACOM I IS A VESSEL

[15] In my judgement, s 2 of the Merchant Shipping Ordinance 1960 is wide enough to include a floating dock, SASACOM I. Section 2 of the Merchant Shipping Ordinance defines 'vessel' as 'anything constructed or used for the carriage on water of persons or property'. I agree with learned counsel for the plaintiff who submitted that SASACOM I is a 'floating' dock. A floating dock is designed to carry in its body, smaller vessel for the purpose of repairs and maintenance. The only difference between a floating dock and a landed dock, is that, a floating dock enjoys the flexibility in mobility on water. Thus, for all intents and purposes, a floating dock is a vessel used 'on water' constructed and used for carriage of persons or property. There would be people on board a floating dock, and there would be docking equipments and materials on the floating docks and these are 'properties'.

[16] In any event, as rightly submitted by learned counsel for the plaintiff, the applicable section is not s 2 of the Merchant Shipping Ordinance 1960 but s 2 of the Merchant Shipping Ordinance ('MSO 1952'), because Merchant Shipping (Amendment and Extension) Act 1984 has been extended to Sarawak. Section 2 of the Merchant Shipping Ordinance defines a ship as 'include every description of vessel used in navigation not propelled by oars'.

[17] It cannot be argued that the floating dock navigates on water within the definition of ship.

[18] It is to be noted that SASACOM I has been registered as a ship under s 12 of the MSO 1952 as evidenced by exh 'WJ1'. It is illogical for the defendant to register SASACOM I as a ship if it feels that SASACOM I is not a ship. Further, pursuant to s 114(e) of the Evidence Act 1950, the court may presume that judicial and official acts have been regularly performed. Hence, the very fact that SASACOM I has been registered as a ship, the court may presume that such official acts had been regularly performed and there is no issue that SASACOM I is not a ship.

[19] The significance of SASACOM I having been registered as a ship is made even more so when considered against the background leading to the granting of the court order dated 29 August 2009. Vide an application dated 15 August 2006 the intervenor, controller of rivers, Sarawak River Board, applied for leave to be allowed to intervene and for certain reliefs relating to the removal of the sunken vessel, SASACOM I, which had become a hazard and danger to and/or interference with riverine traffic especially within the surrounding areas of Kuching Port, etc. The defendant was represented by learned counsel, Mr Alvin Yong, in the interpartes hearing wherein the defendant did not object to the intervention by the Intervenor or the removal of SASACOM I except the costs of removing the same.

[20] Having agreed to the intervention by the intervenor and to the removal of SASACOM I, the defendant now comes to court, six years later with no explanation whatsoever as to why the defendant took so long to make this application, and to say that SASACOM I is not governed by the Merchant Shipping Ordinance 1960. The court will not allow the defendant to blow hot and cold at the same time.

[21] Based on all the reasons aforesaid, the defendant's application is hereby dismissed with cost of RM5,000.

[22] The defendant is presumed insolvent (having been served a 218 notice dated 15 May 2012, on the 24 May 2012 and had failed to comply with the same), yet this application was made on 19 June 2012 which was supported by the affidavit of service affirmed by Kiu Chiong Ming, the director. Also, there is a pending winding up petition against the defendant, vide Kuching High Court Case No KCH-28–29/8 of 2012 and in the winding up proceeding, the defendant is not denying that it is insolvent. The defendant's director made this

application knowing full well that the defendant is insolvent. As this defendant's application is frivolous, I order that the cost of RM5,000 be paid by the director, Kiu Chiong Ming.

Application dismissed with costs of RM5,000.

Reported by Kohila Nesan